

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BRIAN JOHNSON, et al, on behalf of  
themselves and all others similarly situated,

Plaintiffs,

v.

MICROSOFT CORPORATION,  
a Washington corporation,

Defendant.

No. CV 06-0900 RAJ

PLAINTIFFS' REPLY –  
MOTION FOR LEAVE TO AMEND

**Note on Motion Calendar:  
January 14, 2010**

1 **I. INTRODUCTION**

2 1. Plaintiffs agree to withdraw their newly-added, proposed claim for fraudulent  
3 misrepresentation, negligent misrepresentation and fraudulent concealment.

4 2. The claims for injunctive relief are not new. Microsoft asked for and received  
5 this precise list of injunctive relief through discovery responses provided in April 2008.  
6

7 3. Plaintiffs have no intention of reviving class claims *unless* there is a reversal of  
8 this Court's summary judgment ruling. Therefore the proposed TACC correctly and  
9 appropriately sets forth the claims and contentions in issue in this litigation.

10 **II. THE ADDED CAUSE OF ACTION FOR FRAUD**

11 As stated above, Plaintiffs agree to withdraw the proposed fifth cause of action in the  
12 TACC for fraudulent misrepresentation, negligent misrepresentation, and fraudulent concealment.  
13

14 Plaintiffs rational for filing these claims was as follows. Prior to December 2009, this  
15 action was brought as a class action. The class representatives initially brought claims that were  
16 amendable to class certification, and did not pursue causes of action that might present  
17 complications at the certification stage, even though they might otherwise be viable from an  
18 individual perspective. Upon withdrawal of the class claims in December 2009, the individual  
19 plaintiffs were then free to bring claims that might otherwise present distractions in the context of  
20 class certification. The same predicate factual allegations that are alleged in plaintiffs' CPA,  
21 unjust enrichment, and trespass claims also give rise to claims for fraud.  
22

23 Microsoft's objection that the plaintiffs have known about their fraud claims and should  
24 have brought them when they were first known misses the point. The addition of the fraud claims  
25 is not based on any newly discovered knowledge, but rather is based upon the change in the  
26

1 posture of the case (withdrawal of class claims), which made the fraud claims viable as an  
2 individual claim.

3 Plaintiffs have chosen to withdraw these claims in light of Microsoft's threat to re-depose  
4 the plaintiffs. This threat presents a cost-burden that far outweighs what any plaintiff might  
5 recover in damages from Microsoft on their individual fraud claim. It makes no sense, therefore,  
6 to insist on the right to pursue a claim when the largest corporation in the world threatens to turn  
7 the claim into a litigation burden that would far outweigh any potential recovery.  
8

9 **III. MICROSOFT HAS NO LEGITIMATE COMPLAINT REGARDING THE**  
10 **INJUNCTIVE RELIEF SOUGHT BY THE TACC**

11 Microsoft's protestations over the injunctive relief sought in the TACC is much ado about  
12 nothing.

13 First, Microsoft was specifically apprised of each and every point of injunctive relief almost two  
14 years ago, and well in advance of the depositions of all of the plaintiffs.

15 On April 20, 2008, plaintiffs responded to Microsoft's First Set Of Interrogatories To  
16 Newly Added Plaintiffs. Specifically, Microsoft's Interrogatory No. 8 asked; "Describe the  
17 nature of any injunctive, declaratory or equitable relief you seek in this case." Plaintiffs  
18 responded with a detailed list of 18 separate items of injunctive relief. This list was complete and  
19 inclusive, and is the source for the claims now reflected in the proposed TACC. Microsoft was  
20 provided the list for each and every item of injunctive relief more than 20 months ago. *See*  
21 Appendix A, attached hereto.  
22

23 Second, Microsoft deposed each of the plaintiffs after these interrogatory responses were  
24 provided. These interrogatory responses were introduced into the record by Microsoft as an  
25 exhibit at each plaintiff's deposition. *See, e.g.* Appendix B, attached hereto.  
26

1 Third, none of the injunctive relief sought in the TACC is at variance with the relief  
2 sought in the SACC. Each of the 16 specific demands for injunctive relief sought in the TACC is  
3 encompassed and included within the 6 general points of injunctive relief sought in the prayer of  
4 the SACC. *See* Appendix C, attached hereto. The TACC merely provides detail and specificity  
5 with respect to the injunctive relief of which Microsoft was previously apprised. Plaintiffs  
6 believed Microsoft would welcome the list of injunctive relief sought by plaintiffs being  
7 formalized in the pleading, rather than leaving it specified only through discovery. Microsoft's  
8 feigned alarm that Plaintiffs' injunctive relief is new, or a bolt from the blue, is disingenuous.

9  
10 Fourth, Microsoft does not cite any law (because there is none), which prohibits a plaintiff  
11 from seeking any injunctive relief the court finds appropriate based upon the proof presented at  
12 trial.

#### 13 **IV. WITHDRAWAL OF THE CLASS CLAIMS**

14  
15 Microsoft raises a hue and cry over Plaintiffs decision to withdraw class claims prior to  
16 the motion for class certification. Microsoft, claiming wrongdoing by plaintiffs, now demands a  
17 hearing on class certification, or sanctions, or some kind of punitive restrictions on amendments  
18 as a result.

19 There is utterly no legal or procedural support for any of these demands.

20 Plaintiffs' determination to withdraw the class claims was based upon several factors,  
21 including:  
22

23 1. The current status of the case and the rulings consistently in favor of Microsoft on  
24 all motions and contested issues;  
25  
26

1           2.       The Court's scheduling of oral argument a mere five business days after plaintiffs  
2 were due to file their reply, which, given the thousands of pages of briefing, argument, and  
3 evidence submitted for the motion, appeared disadvantageous to plaintiffs;

4           3.       The grant of summary judgment in favor of Microsoft on plaintiffs contract claim;

5           4.       Microsoft's argument in its opposition to the class certification motion, that the  
6 damages provision of the contract would not be applicable or available as a remedy to the trespass  
7 or CPA claims, since the contract cause of action was eliminated by the summary judgment  
8 ruling. (Obviously, Plaintiffs do not agree with this argument, but it nonetheless was a  
9 consideration).  
10

11           Plaintiffs' counsel, taking these (and other) factors into consideration, made a  
12 determination to withdraw the motion for class certification. Plaintiffs' counsel has a duty to their  
13 clients to act in their best interests. Class counsel also has a duty to act in the best interests of the  
14 class. The decision to withdraw the motion for class certification under these circumstances was  
15 overwhelmingly an act in the best interests of the individual clients and the members of the class.  
16

17           There is no provision whatsoever for a defendant to be awarded fees when prevailing on a  
18 motion for class certification. Neither Rule 23, nor Rule 11, nor any case law of any jurisdiction  
19 provide for any kind of sanction or fees based upon a determination of whether a class may or  
20 may not be certified.  
21

22           In this case, the threat of class certification has been eliminated. The class claims (except  
23 for those subject to appeal), have been withdrawn from the litigation. This was achieved prior to  
24 argument, ruling by the court, or reply by plaintiffs. Thus, Microsoft has achieved what it sought  
25 to do at even less cost than would otherwise be expended if the issue had been fully briefed and  
26 argued.

1 All cases providing for the assessment of any award of expenses entail the *addition* of  
2 claims after discovery has been taken, not the *withdrawal* of a claim. Microsoft seeks to turn this  
3 principle on its head and gain advantage from what is, in fact a benefit to Microsoft in the  
4 narrowing of the litigation against it.

5  
6 **V. THE ELLIS AMENDMENTS**

7 The Ellis amendments are not amendments at all, but rather a preservation of the status quo for  
8 purposes of appeal. Ellis' claims must remain intact in the operative pleading in order for his  
9 appellate claims to remain viable.

10 It has long been the rule that "a plaintiff waives all causes of action alleged in the original  
11 complaint which are not alleged in the amended complaint." *London v. Coopers & Lybrand*, 644  
12 F.2d 811, 814 (9th Cir. 1981). Citing, *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Etc.*,  
13 *Local 150*, 440 F.2d 1096 (9th Cir.), cert. denied, 404 U.S. 826, 92 S. Ct. 57, 30 L. Ed. 2d 54  
14 (1971); *Loux v. Rhay*, 375 F.2d 55 (9th Cir. 1967); *Bullen v. De Bretteville*, 239 F.2d 824 (9th  
15 Cir. 1956), cert. denied sub nom. *Treasure Company v. Bullen*, 353 U.S. 947, 77 S. Ct. 825, 1 L.  
16 Ed. 2d 856 (1957). Accord *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

17  
18 **VI. THERE IS NO PREJUDICE TO MICROSOFT**

19 With the withdrawal of the fraud claims, Microsoft's remaining claims of prejudice are reduced  
20 to three. None of the three result in any actual prejudice.

21  
22 The Ellis contract/class claims are included for preservation of appellate rights. They  
23 have no impact on the present litigation, and only become relevant if the 9<sup>th</sup> Circuit Court of  
24 Appeal so instructs this Court.

25 The injunctive relief claims were provided by plaintiffs to Microsoft over two years ago  
26 and Microsoft has had every opportunity to engage in whatever discovery it chose to pursue.

1 They are nothing more than an elaboration in the pleadings of what was already provided through  
2 discovery and were included as a courtesy to Microsoft.

3 The additional allegations concerning the download, operation, and installation of  
4 Validation verses Notifications has been a point of heated contention between the parties since the  
5 inception of the litigation and has been the subject of substantial motion practice and discovery.  
6 (*See*, e.g. Docket # 156.) Because of Microsoft's efforts at obfuscation and obstruction, plaintiffs  
7 have laid out in the operative pleading the precise factual allegations so that the litigation might  
8 proceed based on clear allegations and not upon the intentionally confusing gobbledegook which  
9 Microsoft has turned this issue into. This is not prejudice – this is movement toward clarity and  
10 truthful litigation.  
11

12 Each of the amendments is designed to streamline and focus this lengthy litigation into a  
13 concise, coherent, and pointed roadmap for the remainder of this litigation. The amendments  
14 achieve these goals, and Microsoft's claims of prejudice are geared more towards obstruction than  
15 resolution.  
16

## 17 **VII. FOR THE RECORD**

18 Microsoft's opposition is replete with misstatements of fact and distortions. For the  
19 record, a couple of the most egregious are listed (and corrected) below.  
20

21 "Twelve days before the December 30, 2007 22 deadline for Microsoft's opposition, however, 23 Plaintiffs unexpectedly withdrew it. <i>See</i> Dkt. 24 No. 126. Plaintiffs' last-minute maneuver 25 forced Microsoft to scrap its nearly completed	26 Microsoft's counsel, Karl Quackenbush, actually suggested and recommended that plaintiffs withdraw the motion for class certification set for December 30, 2007 during a conversation with Scott Kamber a few days
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1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	class certification opposition.”  Opposition, page 3, *26 – page 4, *2	before the withdrawal was filed.
18 19 20 21 22 23 24 25 26	“Indeed, Plaintiffs’ proposed Third Amended Consolidated Complaint (“Third Amended Complaint”) asserts class allegations in the dismissed breach of contract claim even though they told the Court they would remove all class allegations.”  Opposition, page 4, *13-16	Plaintiffs never “told the Court they would remove all class allegations.” Plaintiffs’ counsel stated, repeatedly, that plaintiffs would be withdrawing the class allegations on plaintiffs’ remaining claims. Every time Mr. Quackenbush attempted to reframe plaintiff’s counsel’s statement into an “all class allegations” interpretation, he was corrected by plaintiffs’ counsel that the class allegation withdrawal would affect the “remaining” claims. The proposed TACC conforms precisely to this representation.

### VIII. CONCLUSION

For the reasons stated above, plaintiffs respect request that plaintiffs’ motion for leave to amend the SACC, as modified by plaintiffs’ agreement to withdraw their fraud claims, be granted.

DATED this 8th day of January, 2010.

\_\_\_\_\_/s/\_\_\_\_\_  
Alan Himmelfarb

Alan Himmelfarb



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# Appendix A

Honorable Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BRIAN JOHNSON, et al, on behalf of  
themselves and all others similarly situated,

Plaintiffs,

v.

MICROSOFT CORPORATION,  
a Washington corporation,

Defendant.

NO. CV 06-0900 RAJ

PLAINTIFFS RESPONSES TO  
MICROSOFT'S FIRST SET OF  
INTERROGATORIES TO NEWLY ADDED  
PLAINTIFFS

Plaintiffs Brian Weatherill ("Weatherill"), Nathan Verrilli ("Verrilli"), James Grennan ("Grennan"), and Charles Ellis ("Ellis") hereby respond to Defendant Microsoft Corporation's First Set Of Interrogatories To Newly Added Plaintiffs.

PLAINTIFFS RESPONSES TO MICROSOFT'S FIRST  
SET OF INTERROGATORIES TO NEWLY ADDED  
PLAINTIFFS  
CASE NO. CV06\_0900 RAJ

KamberEdelson, LLC  
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- s. By gathering information, at Microsoft's election, from the computer owner's computer, and sending that information back to Microsoft, the operation of the WGA programs infringes on the computer owner's right to privacy;
- t. By tying Class members' right to Windows XP "updates and fixes" to Class members installation of the separate WGA programs, in order to force Class members to install the WGA Validation Anti-Piracy Program;
- u. By tying Class members' right to Windows XP "updates and fixes" to whether Class members' computers continually pass the WGA Validation Anti-Piracy Program tests;
- v. By compromising the integrity, security, and ownership of class members' computers because the WGA Validation Anti-Piracy Program can be used by Microsoft or others to remotely control, reduce, or alter the functioning of class members' computers, or to collect additional personal data, without Class members' consent; and
- w. By forcing consumers to expend money, time, and resources in order to effectuate the removal of the WGA Validation Anti-Piracy Program installed on the computers of Class members without notice or consent.

8. Describe the nature of any injunctive, declaratory or equitable relief you seek in this case.

**ANSWER:**

Plaintiffs seek the following injunctive declaratory and or equitable relief

1. Removal of WGA from all computers in the United States on which it was installed.
2. Reconfiguration of the WGA program so that it is a completely opt-in program.
3. A complete uncoupling of WGA from all past, present, and future security and functionality updates of the XP operating system. This includes any components originally included as part of the Windows XP package (such

as Media Player, Internet Explorer, etc.).

4. The provision of a one-button removal tool for WGA for all residents of the United States; said removal tool should operate as automatically and as seamlessly as the original installation.
5. An independent audit of all information collected by Microsoft through its WGA program.
6. An independent audit of all uses which Microsoft made of the information collected through its WGA program.
7. An independent audit of all revenues Microsoft collected, generated, or otherwise obtained by virtue of its WGA program.
8. An independent audit of all benefits obtained by Microsoft through the use of its WGA program.
9. An independent audit to confirm the destruction of all data and information collected by WGA.
10. Disgorgement of all revenues Microsoft collected, generated, or otherwise obtained by virtue of its WGA program.
11. Disgorgement all benefits obtained by Microsoft through the use of its WGA program.
12. Independent oversight over Microsoft's Update program to insure that all Microsoft Updates are transparent as to what they are and what they do, including the ability to opt-out. This includes, but is not limited to:
  - a. clear, concise descriptions about the update in question;
  - b. presentation of any and all EULAs before any software is downloaded;
  - c. full disclosure prior to the retrieval of any information from the computer system of what information is being retrieved (sent back to Microsoft), why it is being retrieved, what it will be used for, how long it will be maintained, what will be done to protect such information; and when and how it will be disposed of;

d. clear adequate, concise, and easily available help information for further inquiry into what the update does, how to remove it, etc.

13. Independent oversight over Microsoft's Update program to insure that Critical / High Priority Updates only include security updates and other such bug-fixes that can prevent / repair potential harm to the computer.

14. Independent oversight over Microsoft's Update program to insure that Critical / High Priority Updates never include "beta" software, non-security / bug-fixed related software, nor anything that does not completely relate to the security, integrity, and proper running of a person's computer.

15. With respect non-Critical / High Priority Updates, particularly those that add functionality, features, or software programs, etc. Microsoft must include an easily executable removal tool capability built-in to the update.

16. With respect all Updates, once a program is marked as "don't ask me again" it doesn't ask again.

17. Mainstream support for Windows XP through 2012.

18. Release of the source code of all versions of WGA.

Discovery is ongoing and Plaintiffs have not yet determined the nature and extend of further relief.

9. If you contend that the amount of damages sustained by each putative class member by reason of the acts alleged in the Second Amended Consolidated Complaint can be calculated in a common manner in a single proceeding, state what formula or method you intend to use to calculate each putative class member's damages.

**ANSWER:** Plaintiffs contend that the amount of damages can be calculated in a common manner in a single proceeding using the formula set forth in the Windows XP EULA Clause entitled : "LIMITATION OF LIABILITY AND REMEDIES" whereby each class member is provided \$5.00 or the cost of the Windows XP Software. Plaintiffs also contend that the court can devise any other means to calculate damages on a common basis.

10. Describe every agreement you have with legal counsel or any other person or entity concerning the payment of counsel fees, expenses, and costs with respect to this action, including but not limited to (if the agreement so provides) who will advance and who is responsible for payment of the costs and expenses incurred in connection with the prosecution of this action and whether a fee in this action will be shared with any person not a member of your counsel's law firm.

**ANSWER:** Plaintiffs object to this Interrogatory on the grounds that it seeks information that is protected by the attorney-client privilege. Plaintiffs have a written contingency fee agreement with their counsel.

11. Identify each putative class member or other non-expert witness who will testify (whether in person or by declaration or affidavit) in support of class certification in this case and summarize the person's testimony.

**ANSWER:** It is anticipated that the following putative class members will testify in support of class certification: Brian Johnson, Brian Weatherill, Nathan Verrilli, James Grennan, Charles Ellis, Engineered Process Controls, LLC, and Martin Sifuentes. Each of the class representatives are anticipated to submit testimony by way of declaration. It is anticipated that each class representative will testify as to the facts and circumstances by which that person is or became a member of the class he/ it purports to represent, and facts and circumstances addressing issues presented in the motion for class certification. In addition, it is anticipated that each class representative will testify as to his/ its willingness to act as a class representative, and his/ its understanding of the duties and responsibilities of a class representative.

12. Identify each person whom you expect to have testify as an expert witness (whether in person, by declaration, affidavit or expert report) in support of class certification in this case and, with respect to each such person, provide:

- (i) the subject matter and the substance of the facts and opinions as to which the expert will offer an opinion;
- (ii) his or her credentials and curriculum vitae, including a list of all publications by the witness within the preceding ten (10) years;

- (iii) the compensation paid or to be paid for any study, report, or testimony;  
and  
(iv) a listing of all cases in which the expert has testified as an expert at a trial, hearing or by deposition, declaration or affidavit.

**ANSWER:** Plaintiffs have not yet identified expert witnesses.

Objections and Answers dated this 30th day of April, 2008.

KamberEdelson, LLC

By \_\_\_\_\_/s/\_\_\_\_\_  
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PLAINTIFFS RESPONSES TO MICROSOFT'S FIRST  
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6 *and Charles Ellis.*

26 PLAINTIFFS RESPONSES TO MICROSOFT'S FIRST  
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**PROOF OF SERVICE**(JOHNSON, *et al.*, v. MICROSOFT CORP., No. C06-0900 RAJ)

I am a resident of the State of California, and over the age of 18, and not a party to within action; my business address is 2757 Leonis Blvd, Vernon, CA 90058.

On April 30, 2008, I served the within document(s)

**1. NEWLY-ADDED PLAINTIFFS' RESPONSES TO DEFENDANT  
MICROSOFT CORPORATION'S FIRST SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS TO NEWLY-ADDED EACH PLAINTIFFS**

<input checked="" type="checkbox"/>	By email as indicated:		
Addressee		Represent	Service
Gregory J. Hauck Montgomery McCracken Walker & Rhoads 123 S. Broad St., 24th Floor Philadelphia, PA 19109-1099 215-772-1500 Email: ghauck@mmwr.com		Microsoft	Email
Karl Justin Quackenbush Riddell Williams 1001 4th Ave. Plaza, Ste. 4500 Seattle, WA 98154 206-624-3600 Fax: 206-389-1708 Email: kquackenbush@riddellwilliams.com		Microsoft	Email
Todd L. Nunn Kirkpatrick & Lockhart Preston Gates Ellis LLP 925 Fourth Ave., Ste. 2900 Seattle, WA 98104-1158 206-623-7580 Fax: FAX 224-7095 Email: todd.nunn@klgates.com		Microsoft	Email

Executed on April 30, 2008 at Los Angeles, California.

\_\_\_\_\_/s/\_\_\_\_\_  
Alan Himmelfarb

PLAINTIFFS RESPONSES TO MICROSOFT'S FIRST  
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# Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BRIAN JOHNSON, et al.

Plaintiffs

vs.

Case No. CV-06-0900-RAJ

MICROSOFT CORPORATION,  
a Washington corporation

Defendant.

DEPOSITION OF JAMES GRENNAN

TAKEN ON BEHALF OF THE DEFENDANT

ON JULY 9, 2008, BEGINNING AT 8:36 A.M.

IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES

On behalf of the PLAINTIFFS:

Alan Himmelfarb  
2757 Leonis Boulevard  
Vernon, California 90058

On behalf of the DEFENDANT:

Gregory J. Hauck  
123 South Broad Street  
Philadelphia, Pennsylvania 19109

REPORTED BY: Andrea J. Gorman, CSR, RPR

<p style="text-align: right;">98</p> <p>1 recall right now that I have sometime since WGA got on 2 my computer because they were checking to see what you 3 got and you are not going to get an update until you 4 do, but how many times, other than that time, which 5 had to be when automatic was turned off, not many. 6 Q. Let me -- let me ask about your laptop 7 computer, okay? Have you ever installed updates onto 8 that computer from this Microsoft website from which 9 you obtain updates? 10 A. Again, I have no way of knowing. 11 Q. And you don't know whether automatic 12 updates is turned on on that computer? 13 A. That's right, I do not without looking. 14 Q. Well, do you know if that -- if your laptop 15 computer gets updated? 16 A. No, I do not. 17 Q. With respect to your wife's laptop 18 computer, do you know if any -- if you have ever 19 obtained updates and installed onto that computer 20 updates from the Microsoft website? 21 A. I have had that computer too long to 22 remember, I really don't know. I haven't used it for 23 several months. I can tell you one thing, I have a 24 program called Invisus, I-N-V-I-S-U-S, which is my -- 25 I believe it's the program, which is my firewall,</p>	<p style="text-align: right;">100</p> <p>1 and you understand that you're still under oath, 2 correct? 3 A. I'm still under oath, yes. 4 Q. Now, is it your understanding that WGA is 5 composed of two programs, there's WGA validation and 6 WGA notifications? 7 A. Yes. 8 Q. Do you know what WGA validation does? 9 A. WGA validation, I believe, is the program 10 that Microsoft put in my computer and the class 11 members' computer to determine whether they have a 12 valid copy. 13 Q. Okay. And do you know what WGA 14 notifications does? 15 A. Yes, my understanding is the notification 16 is that with WGA on the computer, if you -- if you are 17 going to do an update, Microsoft is going to check to 18 see that you have a valid copy of XP and will notify 19 you if you don't and tell you you can buy a copy for 20 \$149, something like that, less than what I paid for 21 it. 22 Q. Okay. Before you installed WGA on any of 23 your computers, did you review any documents or 24 websites about WGA? 25 MR. HIMMELFARB: Objection misstates --</p>
<p style="text-align: right;">99</p> <p>1 which is my -- keep all the junk off except those that 2 can get on, and it at one time until a month or so ago 3 was plaguing me with messages, there is an update to 4 this, there is an update to that, there is a critical 5 update, and from that is when I probably went and 6 looked at that update, but whether I downloaded it, I 7 don't know. 8 Q. Was it a Microsoft update or was it an 9 update for something else? 10 A. I -- I am not certain, but I remember they 11 did that and then a month or two or three ago, they 12 stopped doing that, they stopped putting out those -- 13 those type of messages. They put out a message like 14 there's a Trojan out that -- that is affecting so and 15 so and we established how to capture that so it won't 16 harm your computer. 17 As I recall, they also put out messages at 18 one time that there is an update that you should go 19 to, like, XP 2, whatever. I can't remember whether 20 they gave me a hypertext to it or not. 21 Q. But you don't know one way or 22 another whether these were Microsoft updates? 23 A. No, I don't really recall. 24 (Lunch break from 11:55 a.m. to 12:40 p.m.) 25 Q. (By Mr. Hauck) We're back on the record</p>	<p style="text-align: right;">101</p> <p>1 assumes facts not in evidence and misstates his 2 testimony. 3 A. I think I've already answered it. I don't 4 recall. 5 (Grennan's Exhibit No. 13 marked for 6 identification) 7 Q. (By Mr. Hauck) Okay. I'm putting in front 8 of you a document that's been marked as Grennan 13. 9 Can you please review the document and familiarize 10 yourself with it. You don't need to review it word 11 for word, I just want you to have a sense as to what 12 the document is. 13 A. Yes, let me -- I've seen all this before. 14 Yeah. I have a copy. 15 Q. Okay. 16 A. Before this copy. 17 Q. Have you seen this document before? 18 A. Yes, I've seen it before, counsel furnished 19 it to me. 20 Q. Okay. Now, I want you to flip to the 21 second -- I'm sorry, the third to the last page of the 22 document. 23 A. The one that has my signature? 24 Q. Yes. 25 A. Yes, that's my signature.</p>

<p style="text-align: right;">102</p> <p>1 Q. Now, if you look at the top of that 2 document, it says, (quoted as read): 3 "I, James Grennan, being first duly sworn 4 declare that I have read the foregoing answers to 5 defendant Microsoft Corporation's first set of 6 interrogatories to newly added plaintiffs, know the 7 contents thereof with respect to those responses that 8 are attributable to me and believe the same to be true 9 and correct." 10 Do you see that? 11 A. Yes, I do. 12 Q. And beneath that, is that your signature? 13 A. Yes, it is. 14 Q. And by signing this document, were you 15 verifying that the answers contained in this document 16 were true and accurate? 17 A. That I did what? 18 Q. When you signed this verification, was it 19 your understanding that you were verifying that the 20 answers contained in this document were true and 21 correct? 22 A. Yes, at that time, to the best of my 23 knowledge. 24 Q. Can you direct your attention to page 3? 25 A. Uh-huh.</p>	<p style="text-align: right;">104</p> <p>1 A. Yes. 2 Q. And then the third set of answers pertains 3 to your laptop, correct? 4 A. Yes. 5 Q. Now, I want to focus on your desktop right 6 now, okay? 7 A. Okay. 8 Q. Now, for your desktop, the answer indicates 9 that WGA was installed on April 2nd, 2007. Do you see 10 that? 11 A. Yes. 12 Q. Okay. How do you know that? 13 A. I would imagine I searched for -- on my 14 desktop for wgalogon.dll and came up with the date of 15 4-2-2007. 16 Q. So you obtained it from the log file? 17 A. Obtained it from the . . . 18 Q. You obtained the date from the log file, is 19 that what you are saying? 20 A. The line file? 21 Q. The log file. 22 A. The log file? I gather that's probably 23 true if that's -- DLL is the log file. 24 Q. I'm asking, where did you obtain it from? 25 A. Pardon?</p>
<p style="text-align: right;">103</p> <p>1 Q. Question number 1 in the middle of the page 2 says (quoted as read): 3 "For each copy of WGA validation and WGA 4 notification software that was installed on any of 5 your computers, identify, one, the update service or 6 other source from which the software was downloaded, 7 two, the date on which the software was installed, 8 and three, the manufacturer and model number of the 9 computer on which the software was installed." 10 Do you see that? 11 A. Yes. 12 Q. Now, if you flip to the next page, towards 13 the middle it says "Grennan," do you see that? 14 A. Yes. 15 Q. And beneath that there are your answers to 16 this interrogatory, correct? 17 A. Yes. 18 Q. And you've provided answers with respect to 19 all three computers that you owned; is that correct? 20 A. That's correct. 21 Q. And the first set of answers pertains to 22 your desktop computer, right? 23 A. That's correct. 24 Q. The second set of answers pertains to your 25 wife's laptop, correct?</p>	<p style="text-align: right;">105</p> <p>1 Q. Where did you obtain that date from? 2 A. I obtained it on my computer. 3 Q. Okay. You don't know from where on your 4 computer? 5 A. I know that wgalogon.dll on my computer has 6 a date 4-2-2007. 7 Q. Do you know whether that date reflects the 8 date of installation? 9 A. I have no knowledge. 10 Q. Well, why did you put April 2nd, 2007 as 11 the answer? 12 A. Because that's what wgalogon.dll told me on 13 my desktop. 14 Q. And you assumed that that was reflecting 15 the date of installation of WGA? 16 A. That was my -- my best answer. I assumed 17 that the answer to Interrogatory Number 1 was right or 18 I wouldn't have put it there. 19 (Grennan's Exhibit No. 14 marked for 20 identification) 21 Q. (By Mr. Hauck) Okay. I'm putting in front 22 of you a document that has been marked as Grennan 14. 23 Can you review this document and let me know when 24 you're finished? 25 A. Yes, I'm finished.</p>

Honorable Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BRIAN JOHNSON, et al, on behalf of  
themselves and all others similarly situated,

Plaintiffs,

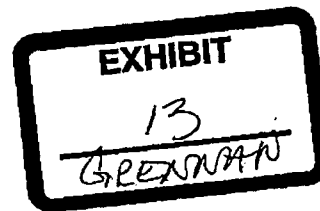
v.

MICROSOFT CORPORATION,  
a Washington corporation,

Defendant.

NO. CV 06-0900 RAJ

PLAINTIFFS RESPONSES TO  
MICROSOFT'S FIRST SET OF  
INTERROGATORIES TO NEWLY ADDED  
PLAINTIFFS



Plaintiffs Brian Weatherill ("Weatherill"), Nathan Verrilli ("Verrilli"), James Grennan ("Grennan"), and Charles Ellis ("Ellis") hereby respond to Defendant Microsoft Corporation's First Set Of Interrogatories To Newly Added Plaintiffs.

PLAINTIFFS RESPONSES TO MICROSOFT'S FIRST  
SET OF INTERROGATORIES TO NEWLY ADDED  
PLAINTIFFS  
CASE NO. CV06\_0900 RAJ

KamberEdelson, LLC  
53 West Jackson Boulevard, Suite 1530  
Chicago, Illinois 60604  
Telephone: (312) 589-6370

Brian Philip Weatherill

August 6, 2008

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BRIAN JOHNSON, et al.,

Plaintiffs,

vs.

No. CV 06-0900-RAJ

MICROSOFT CORPORATION, a

Washington corporation,

Defendant.

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Deposition of  
BRIAN PHILIP WEATHERILL  
Wednesday, August 6, 2008

Reported by:

SHARON CABELLO, RPR

CSR No. 3080

Job No. 691746

CERTIFIED  
COPY



Brian Philip Weatherill

Q. MR. SKOK: I'm going to show you what has been marked as Exhibit Weatherill 16. Take a moment and take a look. This is Plaintiff's Responses to Microsoft's First Set of Interrogatories to Newly Added Plaintiffs.

A. Okay, I believe I'm ready.

Q. Take a look at page 16, Exhibit Weatherill 16.

A. Yes.

Q. You see it says "Verification. I, Brian Weatherill, being first duly sworn, declare that I have read the foregoing Answers to Defendant Microsoft Corporation's First Set of Interrogatories to Newly Added Plaintiffs, know the contents thereof with respect to those responses that are attributable to me, and believe the same to be true and correct."

You see that?

A. Yes.

Q. And there is a signature under there. You see that?

A. Yes.

Q. Is that your signature?

A. It is, yes.

Q. And you understood that by signing this you were verifying the accuracy, truthfulness and completeness of the answers regarding you in this

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

No. CV 06-0900-RAJ

CERTIFIED  
TRANSCRIPT

\*\*\*\*\*  
BRIAN JOHNSON, et al.,  
Plaintiffs;

vs.

MICROSOFT CORPORATION, a  
Washington corporation,  
Defendant.

\*\*\*\*\*

DEPOSITION OF CHARLES ELLIS, a witness  
called on behalf of the Defendant, pursuant  
to the Federal Rules of Civil Procedure,  
before Kristin Kelley, a Registered  
Professional Reporter and Notary Public in  
and for the Commonwealth of Massachusetts,  
at the offices of Goodwin Proctor, 53 State  
Street, Boston, Massachusetts, on Monday,  
July 21, 2008, commencing at 8:34 a.m.

your custom built computer?

It is my understanding that when the notifications program was downloaded the validation program had already been installed and cannot be removed, so given the information that I know of presented by Microsoft it should still be on my computer. Which one?

The validation.

So it's your belief that WGA validation is installed on your custom built computer?

Right. It's my understanding there's no way to remove it once it's installed.

Do you know whether WGA notification is installed on your computer?

To the best of my knowledge, it is not.

(Interrogatories marked Exhibit No. 8 for Identification.)

I've put in front of you a document marked as Ellis 8. Can you please take a look at the document and let me know when you're finished.

MR. HAUCK: Do you mind taking a break right now?

MR. HIMMELFARB: Fine.

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(Recess.)

I've put in front of you a document that's marked as Ellis 8. Can you familiarize yourself with that document and let me know when you are finished.

I believe I'm familiar enough with it.

Can you flip to the second to last page.

Page 19?

Yes. At the top it says "verification". Do you see that?

Yes.

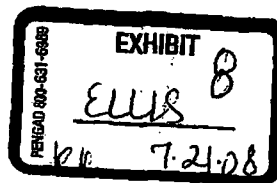
It says "I, Charles Ellis, being first duly sworn declare that I have read the foregoing answers to defendant Microsoft Corporation's first set of interrogatories to newly added plaintiffs, know the contents thereof with respect to those responses that are attributable to me, and believe the same to be true and correct". Do you see that?

I do.

Beneath that is that your signature?

Yes.

By signing it was it your understanding that you were verifying the accuracy of the answers contained within this document?



Honorable Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOHNSON, et al, on behalf of  
and all others similarly situated,

Plaintiffs,

FT CORPORATION,  
on corporation,

Defendant.

NO. CV 06-0900 RAJ

PLAINTIFFS RESPONSES TO  
MICROSOFT'S FIRST SET OF  
INTERROGATORIES TO NEWLY ADDED  
PLAINTIFFS

Plaintiffs Brian Weatherill ("Weatherill"), Nathan Verrilli ("Verrilli"), James Grennan  
, and Charles Ellis ("Ellis") hereby respond to Defendant Microsoft Corporation's  
Interrogatories To Newly Added Plaintiffs.

RESPONSES TO MICROSOFT'S FIRST  
INTERROGATORIES TO NEWLY ADDED

06\_0900 RAJ

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# Appendix C

**Appendix C**  
**Injunctive Relief Compared – SACC vs TACC**

Second Amended Consolidated Complaint (Prayer for Relief )	Third Amended Consolidated Complaint (Paragraph 219)
<p>(i) prohibiting Defendant from engaging in the acts alleged above;</p>	<p>b. Reconfiguration of the WGA program so that it is a completely opt-in program.</p> <p>c. A complete uncoupling of WGA from all past present and future security and functionality updates of the XP operating system. This includes any components originally included as part of the Windows XP package (such as Media Player, Internet Explorer, etc.).</p> <p>l. Independent oversight over Microsoft's Update program to insure that all Microsoft Updates are transparent as to what they are and what they do, including the ability to opt-out. This includes, but is not limited to:</p> <ul style="list-style-type: none"> <li>i. clear, concise descriptions about the update in question;</li> <li>ii. presentation of any and all EULAs before any software is downloaded;</li> <li>iii. full disclosure prior to the retrieval of any information from the computer system of what information is being retrieved (sent back to Microsoft), why it is being retrieved, what it will be used for, how long it will be maintained, what will be done to protect such information; and when and how it will be disposed of;</li> <li>iv. clear adequate, concise, and easily available help information for further inquiry into what the update does, how to remove it, etc.</li> </ul> <p>m. Independent oversight over Microsoft's Update program to insure that Critical / High Priority Updates only include security</p>

	<p>updates and other such bug-fixes that can prevent / repair potential harm to the computer.</p> <p>n. Independent oversight over Microsoft's Update program to insure that Critical / High Priority Updates never include "beta" software, non-security / bug-fixed related software, nor anything that does not completely relate to the security, integrity, and proper running of a person's computer.</p> <p>o. With respect non-Critical / High Priority Updates, particularly those that add functionality, features, or software programs, etc. Microsoft must include an easily executable removal tool capability built-in to the update.</p> <p>p. With respect all Updates, once a program is marked as "don't ask me again" it doesn't ask again.</p>
(ii) requiring Defendant to disgorge all of its ill-gotten gains to Plaintiffs and the other Class members, or to whomever the Court deems appropriate;	<p>j. Disgorgement of all revenues Microsoft collected, generated, or otherwise obtained by virtue of its WGA program.</p> <p>k. Disgorgement all benefits obtained by Microsoft through the use of its WGA program.</p>
(iii) requiring Defendant to delete all data surreptitiously or otherwise collected through the acts of unfair competition or deceptive trade practices alleged above;	i. An independent audit to confirm the destruction of all data and information collected by WGA.
(iv) requiring Defendant to provide Plaintiffs and the other class members a tool to remove WGA in a manner at least as facile as it was installed, and an opportunity to decline any future installation of WGA;	<p>a. Removal of WGA from all computers in the United States on which it was installed.</p> <p>d. The provision of a one-button removal tool for WGA for all residents of the United States; said removal tool should operate as automatically and as seamlessly as the original installation.</p>
(v) awarding Plaintiff and class members full restitution of all monies wrongfully	



acquired by Defendant by means of the wrongful conduct alleged herein; and	
(vi) ordering an accounting and constructive trust imposed on the data, funds or other assets obtained by unlawful means as alleged above, to avoid dissipation, fraudulent transfers, and/or concealment of such assets by Defendant;	<p>e. An independent audit of all information collected by Microsoft through its WGA program.</p> <p>f. An independent audit of all uses which Microsoft made of the information collected through its WGA program.</p> <p>g. An independent audit of all revenues Microsoft collected, generated, or otherwise obtained by virtue of its WGA program.</p> <p>h. An independent audit of all benefits obtained by Microsoft through the use of its WGA program.</p>

## CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Executed on January 8, 2010 at Los Angeles, California.

\_\_\_\_\_/s/\_\_\_\_\_  
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